

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
TONY JENNINGS,

Plaintiff,

vs.

5:17-CV-54

JEREMY DECKER, DARREN ETTINGER,
and CITY of SYRACUSE,

Defendants.

-----x
Portion of Digitally Recorded Telephone Conference

November 26, 2019

James Hanley Federal Building, Syracuse, New York

HONORABLE THÉRÈSE WILEY DANCKS

United States Magistrate Judge, Presiding

APPEARANCES (by telephone)

For Plaintiff: KEVIN M. CANNIZZARO
Attorney at Law
P.O. Box 10849
Albany, NY 12201

For Defendants: CITY OF SYRACUSE CORPORATION COUNSEL
233 East Washington Street
Syracuse, NY 13202
BY: CHRISTINA F. DeJOSEPH, ESQ.

*Eileen McDonough, RPR, CRR
Official United States Court Reporter
P.O. Box 7367
Syracuse, New York 13261
(315) 234-8546*

1 THE CLERK: Good morning. We're here with
2 Magistrate Judge Dancks for a telephone conference, Jennings
3 versus Decker, 17-cv-54. Counsel for plaintiff, please state
4 your appearance.

5 MR. CANNIZZARO: Kevin Cannizzaro, Your Honor.

6 THE CLERK: And for the defendant?

7 MS. DeJOSEPH: Christina DeJoseph with Corporation
8 Counsel's Office.

9 THE COURT: All right. Good morning to both of
10 you.

11 We are teed up for talking about a discovery
12 dispute. I've got dockets 86, 88 and 89. Let me just see if
13 I can summarize what's in dispute.

14 We're talking about personnel files of Decker,
15 Ettinger and Ocker. And it looks like defendants have agreed
16 to produce Decker and Ettinger's files pursuant to a
17 protective order, but not Sergeant Ocker's, is that it?

18 MS. DeJOSEPH: Correct.

19 THE COURT: Okay. All right. And then there is
20 also training materials on the use of force and lots of other
21 things that plaintiff is looking for in terms of training
22 materials, and then prior complaints regarding --

23 MS. DeJOSEPH: I'm sorry to interrupt. We'll
24 produce the training materials at least as it relates to the
25 use of force, and obviously some of it, it's possible I

1 haven't seen them, might even overlap with some of the topics
2 he is seeking because to the extent that it's yearly
3 in-service training, some of it will likely overlap, but that
4 I don't have it in my hand at this very moment.

5 THE COURT: Okay. Well, then let me -- I think the
6 hardest one is going to be the prior complaints with the
7 excessive force, racial profiling five years before the
8 incident regarding all police officers. I think that's what
9 you're looking for, Mr. Cannizzaro, yes?

10 MR. CANNIZZARO: Yes, Your Honor, that's right.

11 THE COURT: All right. So let me back up then.
12 Personnel files with regard to Decker and Ettinger, you're
13 going to produce those, just so I understand, Ms. DeJoseph,
14 pursuant to the protective order, right?

15 MS. DeJOSEPH: That's correct.

16 THE COURT: But not Sergeant Ocker's. I don't know
17 if I'm saying his name right.

18 MS. DeJOSEPH: Yeah, I think that's it. I don't
19 know the answer to that question either. Our position is
20 that because he is no longer a party.

21 THE COURT: So, Mr. Cannizzaro, are you still -- do
22 you still -- are you still demanding Sergeant Ocker's
23 personnel file?

24 MR. CANNIZZARO: So, Your Honor and Christie, I
25 looked at the case law a lot over the weekend and after

1 taking a hard look at it, I think that in terms of the
2 personnel file for Sergeant Ocker, I'm willing to concede
3 that we will not be demanding -- I'm willing to withdraw that
4 demand for his personnel file.

5 However, Your Honor, there is also an objection by
6 the defendants as to the previous complaints against
7 defendant Ocker -- excuse me, Sergeant Ocker, and I do think
8 that those previous complaints or citizens complaints still
9 remain relevant despite the fact that he is a non-party at
10 this point, still remain relevant to the racial profiling
11 claim particularly.

12 I mean, we -- and that goes -- I don't want to go
13 too far until you allow Christie to respond, but it all ties
14 into the prior complaints go to the racial profiling claim
15 here in a broad sense. So while the personnel file may not
16 be completely necessary, I have a feeling at least in my
17 experience prior complaints often are noted in personnel
18 files. So to the extent that we're withdrawing the demand
19 for his full personnel file, I'm having a hard time
20 disconnecting the prior complaints with what may be in the
21 file as they relate to the racial profiling claim, *the Monell*
22 claim that the plaintiff is bringing here.

23 THE COURT: Let me just see, so does that tie in to
24 your -- I mean, are you only seeking prior complaints with
25 regard to racial profiling on the two named defendants and

1 Sergeant Ocker? Because I thought there was a demand -- hold
2 on. I thought there was a demand overall for the last five
3 years before this incident, a pretty big swath of time there,
4 regarding any complaints, you know, as it pertains to the
5 nebulous *Monell* claim.

6 MR. CANNIZZARO: Your Honor, that's correct. Also
7 within our demands we're seeking historical and statistical
8 information regarding complaints lodged against the City of
9 Syracuse officers at large.

10 And again, Your Honor, I mean, I think while we
11 can -- certainly we'll get into the argument that the defense
12 counsel is making regarding the *Monell* claim, whether you
13 look at it from the *Monell* claim, from the racial profiling
14 claim, it's plaintiff's position that these historical
15 records, and I think it's reflected in a number of cases, are
16 vital to establishing either the *Monell* claim or the racial
17 profiling claim particular to the two officers. You know, in
18 terms of the two officers, the racial profiling claim against
19 them specifically looking to prior complaints against these
20 two officers that may or may not exist, and in the event they
21 exist, they go to establishing the animus, the racial animus
22 that these officers may have held on the night of
23 January 5th.

24 In terms of the other officers police department
25 wide, plaintiff's position is that that goes directly to the

1 racial profiling/*Monell* claim in that if, for example, there
2 is failure to train, supervise and discipline officers on a
3 department-wide basis, which that information and belief
4 given some studies which are posted on the city's websites,
5 it seems that there is a viable argument here that there is a
6 culture of racial profiling which existed prior to
7 Mr. Jennings' arrest and the request for prior resistance
8 complaints against the officers at large, Your Honor, goes to
9 that claim.

10 THE COURT: Okay. Presumably you would get any
11 complaints against Sergeant Ocker if I were to permit prior
12 complaints regarding racial profiling or excessive force
13 going to your *Monell* claims. So, you know, let me just --
14 because Sergeant Ocker would presumably, if there were any
15 against him, they would be presumably encompassed in that
16 other demand. Am I right about that?

17 MR. CANNIZZARO: I agree with you.

18 THE COURT: All right.

19 MR. CANNIZZARO: I agree with you.

20 THE COURT: Okay. So certainly I'm going to -- I
21 guess before I get into that too deeply, Ms. DeJoseph, when
22 can you produce the personnel files of Decker and Ettinger
23 pursuant to the protective order?

24 MS. DeJOSEPH: I have them here, Your Honor. Quite
25 frankly, if you hear my voice, I'm a little under the

1 weather. I was out of the office yesterday. I would have
2 produced them yesterday. I'll get to Mr. Cannizzaro either
3 today, I can give them to him today, e-mail sooner, and I'll
4 supplement, I'll put a hard copy in the mail today.

5 THE COURT: Well, is there a protective order in
6 place?

7 MS. DeJOSEPH: There is not but he and I have had
8 some discussion and I guess I trust that when we do get the
9 protective order in place, that I trust just that he will
10 honor it retroactively.

11 THE COURT: Okay. So, Mr. Cannizzaro, she'll
12 produce those two, the two named defendants' personnel
13 records, subject to the protective order, that I'll put a
14 date on that of when I want you all to submit that. But you
15 are in agreement with that, right, Mr. Cannizzaro?

16 MR. CANNIZZARO: Yes, Your Honor. Ms. DeJoseph and
17 I have spoken a number of times over the past couple of weeks
18 and I agree the protective order will be, for a lack of a
19 better term, will be fairly dealt with, and I obviously will
20 even now as they're turned over, I will offer them, share
21 them, and we'll talk about that.

22 MS. DeJOSEPH: Can I just insert one thing here
23 just so we're all on the same page? I know, Kevin, that we
24 discussed the production of the personnel files up to the
25 date of January 5th, 2016. That's what I'm prepared to put

1 in.

2 MR. CANNIZZARO: Yes.

3 MS. DeJOSEPH: I didn't know if that was a topic
4 that you wanted to bring up with the Court if you wanted
5 additional records.

6 MR. CANNIZZARO: No. I think, Christie, that's
7 fine, up to the date of the incident.

8 THE COURT: So personnel records for Decker and
9 Ettinger will be produced, I'll put tomorrow on there for
10 you. Why don't I just put Monday on there for you, just in
11 case something comes up, Monday, December 2nd. And obviously
12 if you can get them over to him today or tomorrow, that's
13 fine.

14 MS. DeJOSEPH: That's the goal.

15 THE COURT: But they will be produced subject to
16 the protective order that you'll be submitting to me and, to
17 be clear, the personnel files will contain everything up to
18 the date of January 5th of 2016.

19 MS. DeJOSEPH: Yes.

20 THE COURT: And then produce them by December 2nd.
21 Can you all get me a proposed stipulated protective order by
22 December 6th? That's next Friday.

23 MS. DeJOSEPH: Yes, I can do that, yep.

24 THE COURT: All right. So put it together and get
25 it over to Mr. Cannizzaro so that the two of you can

1 presumably stipulate to the contents of it and get it to me
2 by Friday, December 6th. And make sure, I know you have
3 standard orders that I think certainly pass muster in this
4 court, but just make sure, Ms. DeJoseph, that something in
5 the order addresses our Local Rule 83.13 that you won't be
6 filing anything under seal without getting permission from
7 the Court first even if it's designated confidential by the
8 parties. Okay?

9 MS. DeJOSEPH: I'll make sure that happens.

10 THE COURT: Just make sure a paragraph or a couple
11 sentences in there will reference that the parties will
12 follow Local Rule 83.13 if they're going to be seeking to
13 file something under seal.

14 MS. DeJOSEPH: Okay.

15 THE COURT: Okay. Then with regard to the training
16 materials for Decker and Ettinger, I'm going to guess that
17 that stuff is all in their personnel files.

18 MS. DeJOSEPH: It is.

19 THE COURT: It is? Okay.

20 MS. DeJOSEPH: I should say some of it is. The
21 essentially memos ordering them to attend certain trainings
22 are in there. I believe there's a separate demand for the
23 actual training materials.

24 THE COURT: Yeah, there is, and that's what I'm
25 getting at. I'm trying to figure out, do I need to make a

1 specific directive for that or will the information just be
2 contained in their personnel files?

3 MS. DeJOSEPH: It was not. However, in the spirit
4 of trying to, you know, proceed in good faith, I have asked
5 for those materials to be sent to me. I'm waiting for them.
6 And I will -- you know, part of me kind of went back and
7 forth on whether or not that was relevant and that would sort
8 of give plaintiff an opportunity to essentially build their
9 *Monell* claim on those materials, but I think I'll produce
10 them.

11 THE COURT: Well, I'm going to direct you to
12 produce them.

13 MS. DeJOSEPH: I figured you might so that's why I
14 asked for them ahead of time and that's why I was going to do
15 it myself. Is it okay then with the same understanding up to
16 the date of January 5th of 2016, the training records?

17 THE COURT: Yes.

18 MS. DeJOSEPH: Okay.

19 THE COURT: So training with regard to Decker and
20 Ettinger on the use of force. I know there were several
21 various topics that you were looking for training materials
22 on, Mr. Cannizzaro, but I'm limiting it to use of force. If
23 there is any racial training, diversity training, that sort
24 of thing, they ought to have that and then --

25 MS. DeJOSEPH: It's likely to spill over. I mean,

1 in-service training materials, annual training cover a wide
2 variety of topics, so it's likely it would sort of be
3 difficult to parse that out anyway. I'm happy to produce
4 that.

5 THE COURT: Okay. And then again up to, what
6 they've attended up to January 5th of 2016.

7 MS. DeJOSEPH: Okay.

8 THE COURT: So that's --

9 MR. CANNIZZARO: Your Honor, if I may? I just want
10 to make sure, I'm okay with just the excessive force --
11 excuse me, the use of force and the diversity training,
12 racial sensitivity training. I just want to make sure that
13 subsumed within that, Your Honor, any implicit bias training
14 to the extent it exists, and also it may be it goes without
15 saying that may be within those materials, but I want to make
16 sure about that. That was one of the requests that I had in
17 our demand, and I want to just stress that we are looking for
18 the extent to which the Syracuse Police Department has
19 implicit bias training materials which these officers were
20 trained with or trained under.

21 THE COURT: Okay. I mean, that falls under -- to
22 me that falls under diversity training, implicit bias
23 training would.

24 MS. DeJOSEPH: Whatever's in this there on that
25 topic that can be considered, I will turn it over.

1 THE COURT: Okay. You got that, Mr. Cannizzaro?

2 MR. CANNIZZARO: That's fine, Your Honor.

3 THE COURT: And let me -- when can you get that to
4 Mr. Cannizzaro?

5 MS. DeJOSEPH: Um, I don't have that in hand. I've
6 been told I would have that. After we get off the phone, I
7 will call my contact over there and express that that needs
8 to be sort of put at the top of the list. I can have that --
9 I'm not going to be in the office tomorrow, the rest of the
10 week is kind of shot for the holiday, but I can no later
11 than, you know, early next week.

12 THE COURT: Well, I can put this -- I'll put -- I
13 just want to give you realistic time.

14 MS. DeJOSEPH: I understand, and I appreciate that.

15 THE COURT: December 6th, the end of next week?

16 MS. DeJOSEPH: Okay. If the Court ordered that,
17 that gives me a little bit more of a firm leg to stand on
18 when I ask for this stuff, I say the Judge is telling me to
19 do it.

20 THE COURT: Yep, perfect. Use me as a hammer any
21 time you need to.

22 MS. DeJOSEPH: That's right.

23 THE COURT: So December 6th. That's the same date
24 we talked about the confidentiality order.

25 MS. DeJOSEPH: Yep.

1 THE COURT: All right. Now the sticky -- the real
2 sticky wicket as I see it is the prior complaints regarding
3 excessive -- well, regarding a whole bunch of things that
4 Mr. Cannizzaro is looking for. But in my mind, and I
5 appreciate your arguments, Ms. DeJoseph, about the
6 loosey-goosey pleading of a *Monell* claim, but I read Judge
7 Kahn's decision, a couple of follow-up shorter orders and
8 text orders on the issue, and I'm going to direct -- I'm
9 going to direct that prior complaints with regard to
10 excessive force and racial profiling be produced for a
11 five-year period prior to the date of the incident. So that
12 would be 2011 to 2016, January of 2011 to January of 2016.

13 MS. DeJOSEPH: Your Honor, if I may?

14 THE COURT: Yeah, go ahead.

15 MS. DeJOSEPH: I mean, it's obviously outlined in
16 my letter and I'm not going to belabor what I address in my
17 letter, but when the Court reopened discovery, it did do so
18 with the discretion of essentially you, Your Honor.

19 THE COURT: Yeah, I saw it.

20 MS. DeJOSEPH: In terms of the scope of it.

21 THE COURT: Yep.

22 MS. DeJOSEPH: And you understand our position
23 there is that essentially nothing -- we're kind of in a
24 difficult position because there is nothing pleaded and now
25 they can sort of create, and sort of create that they found

1 what's produced, and I think that's unfair.

2 THE COURT: Let me ask Mr. Cannizzaro this. What
3 is exactly your *Monell* claim? Is it a formal
4 unconstitutional policy existed? Is it a persistent
5 widespread practice? Is it a deliberate indifference? What
6 is it?

7 MR. CANNIZZARO: So, Your Honor, I think -- and
8 Ms. DeJoseph and I have gone back and forth on this over the
9 last couple of weeks. I think that the plaintiff -- not that
10 I think. The plaintiff's claim is twofold. One, that there
11 was -- under the *Monell*, one that there was widespread policy
12 or practice of racial profiling within the Syracuse Police
13 Department which led to these officers taking the action they
14 did on January 5th. And that one, Your Honor, I would argue
15 while it is basic, as I said in our letter, it is basic, but
16 I thinks it's not particularly sufficiently pled in
17 Mr. Jennings' complaint that he put together two years ago.

18 The other piece of this, Your Honor, is the, you
19 know, failure to train, discipline and supervise officers. I
20 think both pieces of those are really the only avenues for
21 Mr. Jennings to make an argument as regards to the *Monell*
22 claim and that is -- those are the theories that the
23 plaintiff will be proceeding on.

24 You know, without belaboring the point, as you said
25 Judge Kahn addressed this, but I think something that's

1 important to note from an efficiency standpoint here for both
2 the Court and counsel is Judge Kahn also left open the
3 opportunity for defense counsel to file dispositive motions
4 at the close of discovery on January 5th, which --

5 THE COURT: Well, she's kind of asked for
6 permission to do that and he already denied it once.

7 MR. CANNIZZARO: Sure. You're right about that,
8 Your Honor. But I would say that if we were to get to the
9 end of discovery and Ms. DeJoseph's objections as to the
10 nebulous nature of the *Monell* claim are still as strong as
11 she's been representing up to this point, I would imagine
12 that defense counsel's going to make that argument to file
13 another motion on the *Monell* claim itself.

14 So I think six of one, half a dozen of another in
15 some ways, amending the complaint certainly would complicate
16 things in terms of the schedule that we have here possibly
17 and also open up other areas that are unanticipated which may
18 be opened in so doing.

19 So again I think, you know, I would be against any
20 idea of amending the complaint simply because the Court has
21 looked at this pretty thoroughly and left open some other
22 avenues for defense counsel.

23 THE COURT: Okay. Yeah, and I'm also looking
24 unfavorably upon trying to amend the complaint at this late
25 date. But so really what you're looking for is complaints

1 regarding racial profiling. Because a failure to train, you
2 know, you're going to get information from the personnel
3 files and what training that we've already discussed, so
4 really it's racial profiling, complaints about racial
5 profiling, right?

6 MR. CANNIZZARO: That's correct. That's correct,
7 Your Honor.

8 THE COURT: Okay. All right.

9 MS. DeJOSEPH: So we are to produce filing of
10 complaints of racial profiling in that five-year period?

11 THE COURT: Yes. That's what I'm going to direct.
12 So not excessive force, just racial profiling complaints five
13 years before January 5th of 2016, so it would be January 2011
14 to January of 2016.

15 MS. DeJOSEPH: Okay. Obviously, just to be clear
16 because we're on the phone, that would include anything --
17 any complaints made directly to the police department itself?

18 THE COURT: Yep.

19 MS. DeJOSEPH: And then but sort of a -- the CRB,
20 it's sort of an odd relationship, but if I find a difficult
21 time with them, I will reach out to the Court if they're not
22 going to willingly give me those things. You know, not to
23 get into it too much but it's a little bit touchy sometimes
24 with them.

25 THE COURT: Yep.

1 MS. DeJOSEPH: So I will make the request for prior
2 complaints limited to racial profiling made to the CRB
3 between that time period.

4 THE COURT: Yep. And the police department. If
5 you have trouble with the CRB, you let me know. But it's
6 going to be in a text order from this phone call, so if you
7 need to waive that in front of them.

8 MS. DeJOSEPH: I will.

9 THE COURT: You know, the other thing, I mean, I
10 recognize that one citizen's complaint to the Citizen Review
11 Board about any particular officer may have several different
12 things that they're complaining about and you may need to do
13 some redacting.

14 MS. DeJOSEPH: Okay.

15 THE COURT: Which could take some time.

16 MS. DeJOSEPH: I was going to bring that up, the
17 same thing with (inaudible).

18 THE COURT: Yes. So anything that doesn't pertain
19 to racial profiling in any complaints that are uncovered in
20 that five-year period, I know you're going to need to spend
21 some time going through it and redacting it.

22 So what else, I mean, aside from the end of the
23 year holidays, you got a trial or anything coming up,
24 Ms. DeJoseph?

25 MS. DeJOSEPH: Our office does in early January --

1 excuse me, in about two weeks, in December, but I don't think
2 I'll be heavily involved in that, so I should be able to
3 spend some time. And I can also get some help, I can get
4 some help. I can have my assistant help me with this because
5 that might be a little bit of -- excuse me. The redactions
6 will obviously have to do with anything unrelated to racial
7 profiling?

8 THE COURT: Correct.

9 MS. DeJOSEPH: And do we need to produce any --
10 what about substantiated versus unsubstantiated complaints?

11 THE COURT: Well, the CRB, it should be
12 substantiated complaints. I know that's not always easy to
13 tell from the CRB records, but it should be just
14 substantiated complaints both in the PD records and the CRB
15 records.

16 MS. DeJOSEPH: Okay. I had a problem in another
17 case that, to be frank, their record keeping with respect to
18 unsubstantiated complaints is essentially nonexistent, so I
19 think it gives the false impression of a higher degree of
20 substantiation than actually exists, but I'll deal with that.
21 I'll figure that out.

22 THE COURT: Okay. Again, if you have trouble, you
23 can let me know.

24 MS. DeJOSEPH: I sure will. Thank you.

25 THE COURT: I know that Judge Lovric, who touched

1 this file for a very brief period of time, gave you until
2 January 6th to complete all this discovery. I mean, can you
3 meet that date, Ms. DeJoseph, with the --

4 MR. CANNIZZARO: Your Honor --

5 THE COURT: Hold on, Mr. Cannizzaro. I'm just
6 talking to Ms. DeJoseph.

7 With regard to the complaints on racial profiling,
8 do you think that's doable?

9 MS. DeJOSEPH: That could be difficult with the
10 holiday. I will certainly do my best.

11 The other little wrinkle in this is the deposition
12 requests that have been made, and I certainly requested in
13 the last phone conference with Judge Lovric to be able to
14 depose the plaintiff, and then Mr. Cannizzaro served
15 deposition requests on me with respect to the named officers
16 as well as Sergeant Ocker, and he served on me yesterday via
17 e-mail, which I sort of accepted under the understanding that
18 it clearly may not be the case but with respect to former Chief
19 Fowler, and he noticed that for December 29th which is a
20 Sunday.

21 MR. CANNIZZARO: Christie, I'm sorry, I'm going to
22 have to amend that.

23 MS. DeJOSEPH: Yeah. So I guess, I don't know if
24 I'll be able to squeeze all of those things in.

25 THE COURT: So who exactly do you want,

1 Mr. Cannizzaro? You want the two remaining defendants,
2 right, Decker and the other?

3 MR. CANNIZZARO: Yes, Your Honor. Officers Decker
4 and Ettinger, correct. And then Sergeant Ocker. And then
5 finally from the defendants' side of things, he is retired
6 now, Your Honor, but former Police Chief Frank Fowler.

7 THE COURT: Okay. And then, Ms. DeJoseph, you want
8 the plaintiff, correct?

9 MS. DeJOSEPH: Yes.

10 THE COURT: So no depositions were taken before?

11 MS. DeJOSEPH: That is unfortunately correct.

12 THE COURT: Okay. All right. Look, I don't have a
13 problem with you doing all these depositions. Judge Kahn has
14 reopened discovery, and I know you're pro bono,
15 Mr. Cannizzaro.

16 MR. CANNIZZARO: Yes.

17 THE COURT: So I guess that it seems to me like a
18 little more time is going to be needed to get all these
19 people in and you got to find out if -- is the former police
20 chief still around, Ms. DeJoseph? I haven't read anything or
21 I don't know whether he is totally retired and he is a snow
22 bird or what.

23 MS. DeJOSEPH: I saw him not too long ago at an
24 event so he is around. I have the contact information. You
25 know, he is retired but, you know, he has been gracious

1 enough to -- I'm sure he will work with me.

2 THE COURT: Okay. Why don't I give you until,
3 let's do this, by January 6th you're to produce the prior
4 complaints as we've discussed, okay, prior complaints
5 regarding racial profiling redacted as to anything other than
6 that that may appear on a page, and just substantiated
7 complaints, and that's police department, complaints to the
8 PD and complaints to the CRB.

9 MS. DeJOSEPH: Okay.

10 THE COURT: And then I'll put January 31st, I'm
11 just looking at the -- yeah, I got to make sure I got the
12 2020 calendar. January 31st is a Friday, so we're still on a
13 business day, that will be for all disclosure including these
14 depositions.

15 MS. DeJOSEPH: January 31st, Your Honor?

16 THE COURT: Yes. But what I want the two of you to
17 do is talk to your plaintiff, Mr. Cannizzaro. I know he
18 is -- where is he? He is in Cayuga County Correctional
19 Facility?

20 MR. CANNIZZARO: He is in the state facility, yes,
21 Your Honor.

22 THE COURT: He is at Cayuga, right?

23 MR. CANNIZZARO: He is in Cayuga Correctional, yes,
24 Your Honor.

25 THE COURT: But you need to somehow get in touch

1 with him to find out availability for a deposition.
2 Ms. DeJoseph, get in touch with Ocker, the two named
3 remaining defendants Decker and Ettinger, and the former
4 Police Chief Fowler and find out their availability to keep
5 it on your radar screens. Then the two of you talk and nail
6 down dates that are good for you and for your witnesses. And
7 then I would like a status report on the docket. I'll give
8 you plenty of time to get ahold of people, but by
9 December 20th as to I want the deposition schedule laid out
10 for me.

11 MS. DeJOSEPH: Okay.

12 MR. CANNIZZARO: Your Honor, I would just request,
13 you know, for the depositions of the plaintiff, it may be
14 easier, Your Honor, rather than have to obviously produce
15 him, sort of DOCCS for us to hold that deposition at Cayuga
16 Correctional, both myself and Ms. DeJoseph to go there,
17 rather than trying to produce him in any way. So that would
18 be my only request.

19 MS. DeJOSEPH: Yeah.

20 MR. CANNIZZARO: I just wanted to make sure, it
21 definitely would be easier doing it that way.

22 THE COURT: Yeah, that's what I envisioned, too, is
23 that you would go there to do his deposition. If you have
24 trouble with the facility in getting it scheduled and you
25 need something from me to help you do that, let me know right

1 away.

2 MR. CANNIZZARO: Okay.

3 THE COURT: When you're in touch, because I know
4 you have got to make arrangements with the facility to get
5 that done, but let me know if you have any problem with that.

6 But I'll ask, Ms. DeJoseph, if you would file the
7 status report by December 16th laying out the schedule of
8 deposition dates that you've got -- I'm sorry, I said
9 December 20th on that.

10 MS. DeJOSEPH: Okay.

11 THE COURT: Okay. Just so that way it will keep it
12 on the forefront for both of you and before your calendars
13 get too full for January, and making sure that the witnesses
14 are all available and can be done too.

15 MS. DeJOSEPH: Okay. And just to be clear, you
16 want all of these done by January 31st, correct?

17 THE COURT: Correct, yeah. So I'm extending the
18 discovery deadline to January 31st for this limited discovery
19 that we've talked about, the five depositions including the
20 plaintiff, the personnel file stuff, the training, and then
21 the prior complaints as we've discussed. That's the universe
22 of further discovery to be completed by January 31.

23 Mr. Cannizzaro, is there something else you need?

24 MR. CANNIZZARO: Only I just want to clear this up.
25 I talked to Ms. DeJoseph about this specific to the Citizens

1 Review Board, and I'm trying to balance the needs of this
2 case with the discovery demands I'm doing here, but in terms
3 of the records from the Citizens Review Board, which
4 Ms. DeJoseph already addressed, I don't know if it would be
5 helpful for the Court, I was planning on serving possibly a
6 subpoena, a non-party subpoena on them. I don't want to
7 complicate things more. So it's really if Ms. DeJoseph
8 thinks she can get the records we're looking for from them
9 without that, I'm happy not to serve a non-party subpoena.
10 If the Court believes that would be helpful in terms of
11 motivating the Citizens Review Board, I'm happy to do that.

12 I guess my point is I was planning on doing it, I
13 don't want to do it if it's going to complicate things for
14 the Court or Ms. DeJoseph further specific to the Citizens
15 Review Board. And I certainly would like to know the Court's
16 position on that if which way -- in other words, I don't want
17 to surprise you with a non-party subpoena.

18 THE COURT: Right. I don't want you serving a
19 subpoena until we know that Ms. DeJoseph has somehow hit a
20 dead-end there.

21 MR. CANNIZZARO: Okay.

22 MS. DeJOSEPH: I'll reach out to them today. And
23 essentially I know you mentioned a deposition, Kevin, but if
24 I can get the records, if I can get the records from them, so
25 the prior substantiated complaints of racial profiling in

1 that time period, does that satisfy what you're looking for?

2 MR. CANNIZZARO: That, and also, you know, I have
3 the reports from the Citizens Review Board that had the
4 findings in this case. However, the officer of personnel --
5 I suppose this can be addressed with a witness at trial, but
6 the officers that are named in the report are not named by
7 name; they're named by Officer One, Two and Three. So I
8 think that could cause problems as we approach trial not
9 having the report naming the actual officers. So that's the
10 only other piece, other than the prior complaints, that's the
11 only other piece of this that I would be looking for from the
12 Citizens Review Board.

13 THE COURT: Would they even have the answer to
14 that, know exactly who Officers One, Two and Three are? I
15 assume they would be Ocker, Decker and Ettinger.

16 MR. CANNIZZARO: Your Honor, I intend to -- this is
17 something that Ms. DeJoseph and I went back and forth on. If
18 we get to, without settling this in any way before we get to
19 the end of January, one of my intentions is to call the
20 administrator of the Citizens Review Board at trial as an
21 authenticating witness for the report itself. And I went
22 back and forth with Ms. DeJoseph on whether a deposition was
23 needed before the close of discovery.

24 I think we can deal with this as a trial subpoena,
25 a trial witness at trial. But I have some concern that not

1 being able to identify the officers beyond Officers One, Two,
2 Three may raise some admissibility/other evidentiary
3 objections at trial.

4 THE COURT: I guess, Ms. DeJoseph, any -- are you
5 able to --

6 MS. DeJOSEPH: I mean, he has gone back and forth
7 on whether or not it would be admissible at trial and our
8 position is that it is not. What I am willing to do, though,
9 sort of to bypass the need to call witnesses, I would
10 stipulate to the authenticity of it. I mean, I would reserve
11 my other objections. I don't think it's admissible for
12 several, several reasons. But in terms of what we produce,
13 and I will be -- it's part of the op file that I will be
14 turning over as well. I will stipulate to the authenticity
15 of it and I think that will dispense the need to call a
16 witness assuming it is permitted into evidence.

17 THE COURT: I think you can cross this bridge a
18 little later. Why don't you see what you get,
19 Mr. Cannizzaro, and what Ms. DeJoseph is able to produce.

20 And I'll tell you what, I'll schedule another
21 conference call in this case just so we can circle back.
22 When I see that report of deposition dates, I'll schedule
23 another conference call probably after the depositions are
24 completed but before the end of the month of January and we
25 can address any other little hanging chads at that point if

1 there is anything left.

2 MS. DeJOSEPH: Okay.

3 MR. CANNIZZARO: Sure.

4 THE COURT: All right. Including that issue that
5 you just raised, Mr. Cannizzaro, about authenticating
6 records, okay.

7 MR. CANNIZZARO: Sure.

8 MS. DeJOSEPH: If I may, this might not be the
9 appropriate venue to have this discussion, please don't be --

10 THE COURT: I do have people queued up for
11 something that was supposed to happen at 10:30. So what do
12 you got?

13 MS. DeJOSEPH: I apologize.

14 THE COURT: That's okay.

15 (Remaining portion of the transcript has been
16 separated out and filed under seal.)

17 * * *

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Official Court Reporter in and for the United States District Court, Northern District of New York, DO HEREBY CERTIFY that I transcribed the foregoing proceedings from a digital recording, and that the foregoing is a true and correct transcript thereof.

Eileen McDonough

EILEEN MCDONOUGH, RPR, CRR
Official U.S. Court Reporter